

## STATE OF ILLINOIS

## ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
on its own motion	)	
	)	Docket No. 01-0705
Northern Illinois Gas Company d/b/a NICOR	)	
Gas Company	)	
	)	
Reconciliation of Revenues collected under	)	
Gas Adjustment Charges with Actual Costs	)	
prudently incurred	)	
	)	
Illinois Commerce Commission	)	
on its own motion	)	
	)	Docket No. 02-0067
Northern Illinois Gas Company d/b/a NICOR	)	
Gas Company	)	
	)	
Proceeding to review Rider 4, Gas Cost, pursuant	)	
to Section 9-244(c) of the Public Utilities Act	)	
	)	
Illinois Commerce Commission	)	
on its own motion	)	
	)	Docket No. 02-0725
Northern Illinois Gas Company d/b/a NICOR	)	
Gas Company	)	
	)	
Reconciliation of Revenues collected under	)	
Gas Adjustment Charges with Actual Costs	)	
prudently incurred	)	

**REPLY IN SUPPORT OF MOTION TO STRIKE  
PORTIONS OF DIRECT TESTIMONY**

Northern Illinois Gas Company d/b/a Nicor Gas Company (“Nicor Gas” or the “Company”) hereby files this Reply in support of its Motion to Strike Portions of Direct Testimony (“Motion”) filed by Staff (“Staff”) of the Illinois Commerce Commission (the “Commission”) and the Citizens Utility Board (“CUB”).

**I.**  
**INTRODUCTION**

Nicor Gas has moved the Administrative Law Judges (the “ALJs”) to strike inadmissible portions of Staff’s and CUB’s proposed direct testimony and to require these parties to re-file amended testimony consistent with the ALJs’ rulings. As demonstrated in the Motion, Staff’s and CUB’s proposed testimony suffers from four major defects, all of which threaten to undermine the reliability of the record in this proceeding:

1. ***Previously Struck Testimony.*** Staff’s and CUB’s testimony directly violates prior evidentiary rulings by including inadmissible statements identical or substantially similar to testimony previously struck by the ALJs.<sup>1</sup>
2. ***Discovery Depositions.*** The proposed testimony blatantly misuses the discovery depositions taken in this proceeding by incorporating extensive and unreliable inadmissible hearsay.
3. ***State-of-Mind and Otherwise Inadmissible Testimony.*** The proposed testimony includes rampant and irrelevant speculation as to what Nicor Gas and/or its employees supposedly knew or believed at various times.
4. ***Hearsay Exhibits.*** Staff and CUB attach more than two dozen documents to their testimony. Some have no connection to any proposed adjustment. Others are illegible or incomplete. Others are duplicates of the same document. None has any proper foundation.

Staff and CUB advance a number of specious objections to the Motion, among them, that their witnesses’ claimed expertise in matters of gas procurement allows those witnesses to opine on the “corporate” state-of-mind and intentions of Nicor Gas; that virtually anything said by a Nicor Gas employee in a discovery deposition is an “admission” and thus may be received into evidence; and that the ALJs should disregard their prior, correct rulings at the earlier April 8,

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<sup>1</sup> Nicor Gas attached a copy of the April 8, 2004 pretrial hearing transcript to the Motion. For the ALJs’ convenience, a copy also is attached to this Reply. See attached Ex. A.

2004 pretrial hearing simply because Nicor Gas has filed new more abbreviated direct testimony.<sup>2</sup> None of these positions, or any of the other arguments advanced in opposition to Nicor Gas' Motion, has any merit.

Since filing the Motion, Nicor Gas has worked with Staff and CUB to narrow the disputed issues before the ALJs. The parties have compromised on a number of items. In particular, Nicor Gas has agreed to stipulate into the record many of the hearsay documents attached to Staff's and CUB's proposed testimony.<sup>3</sup> For the ALJs' convenience, the Motion attached a table for each Staff and CUB witness that included a numbered listing of the Company's objections to that witness's testimony. Nicor Gas has attached updated objections tables to this Reply. The updated objections tables include specific reply arguments to Staff and CUB. To avoid confusion, Nicor Gas has maintained the same numbering as in the Motion and simply indicated where an objection has been conceded or withdrawn.<sup>4</sup>

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<sup>2</sup> The Company condensed the evidence in its new direct case from nine witnesses to only two. Bartlett Dir., Nicor Gas Ex. 1.0, and Gorenz Dir., Nicor Gas Ex. 2.0. Their testimony is based directly upon the Company's March 2003 audited restated financial results for the 1999 to 2001 time period and the related accounting adjustments to the GCPP's results which have been on file with the Commission since April 2003.

<sup>3</sup> The parties today jointly have filed a First Stipulation identifying the documents that they have agreed may be admitted into the record at hearing without further evidentiary foundation and the terms upon which the documents would be available for use in evidence. First Stipulation (Apr. 2, 2010).

<sup>4</sup> See attached updated Ex. B (Staff witness Zuraski), Ex. C (Staff witness Maple), Ex. D (Staff witness Everson), Ex. E (Staff witness Knepler) and Ex. F (CUB witness Mierzwa). For ease of reference, the Motion also provided a copy of each piece of witness's testimony that was color-coded based upon the Company's four main categories of objections. Testimony that the ALJs previously had struck was highlighted in "red"; testimony that misused the discovery depositions was highlighted in "yellow"; testimony that speculated as to state-of-mind or is otherwise improper was highlighted in "green"; and testimony related to non-evidentiary hearsay documents was highlighted in "blue". Nicor Gas has reattached those color-coded copies to this Reply.

## II. ARGUMENT

### A. Scope Of This Consolidated Proceeding

The fundamental error in Staff's and CUB's proposed testimony is the underlying implication that the Commission's approval of the former Gas Cost Performance Program (the "GCPP") can be ignored and the parties are free to offer their speculation about what might have been done or what rates would have been had the circumstances been different in 2000-2002. Instead, the central issue is whether the rates collected during that period were justified in the context of the GCPP. The Commission's Second Interim Order established the framework for this proceeding, and specified that the Commission would consider:

all issues relating to the operation of the Program Nicor Gas implemented under tariffs filed in accordance with the Commission's Order entered November 23, 1999, in Docket 99-0127, and all issues relating to any refunds that may be owing to Nicor customers *as a result of the operation of the Program* and as a result of the operation of the Company's Rider 6 in 1999, 2000, 2001, and 2002, and for ordering such other and further relief as deemed equitable and just.

Second Interim Order at 6 (Dec. 17, 2002) (emphasis provided).

It is clear from the Second Interim Order that refunds will arise only if the rates collected were not justified within the context of, or were not authorized by, the former GCPP.<sup>5</sup> Where, as here, the rates were authorized under Section 9-244 of the Illinois Public Utilities Act (the "Act"), 220 ILCS 5/9-244, instead of under Section 9-201, 220 ILCS 5/9-201, the Commission's review may encompass only the propriety of charges under the alternative regulatory structure then in effect. As the first sentence of Section 9-244 explicitly states, the Commission's

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<sup>5</sup> The GCPP has not operated since December 31, 2002. Every other civil, criminal or regulatory proceeding related to the former GCPP by now has closed with no finding of liability against Nicor Gas. *See* Mot. at 25-26.

authority under that Section exists and may be exercised “[n]otwithstanding any of the ratemaking provisions of Article IX ... .” Much of Staff’s and CUB’s proposed testimony, however, has nothing to do with this question.

CUB acknowledges that Nicor Gas “is correct that—at its core—this proceeding is aimed at determining the Company’s performance under [the GCPP] ... .” CUB Resp. at 2.

Nonetheless, CUB mistakenly asserts that “the intent of Nicor’s Motion is to severely—and improperly—limit this record and the issues the Commission may consider in reviewing Nicor’s performance under the GCPP.” *Id.* The only “intent” of the Motion is to move this proceeding toward a reasonable and sustainable outcome. Although the Company does not believe the evidence will support any of the Staff or CUB adjustments, the Motion does not address the substance of those claims. It merely asks the ALJs to enforce their prior evidentiary rulings and to require CUB and Staff to prove whatever claims they may have that are within the scope of the Second Interim Order, if they are able, without resorting to speculation, inadmissible hearsay and innuendo.

## **B. Previously Struck Testimony**

Staff’s and CUB’s “new” proposed testimony includes statements that the ALJs previously and explicitly determined were inadmissible. Neither Staff nor CUB ever has asked for reconsideration of the ALJs’ April 8, 2004 pretrial rulings or sought interlocutory appeal. Neither this tribunal nor Nicor Gas should be required to relitigate the admissibility of proposed testimony that has been subject to objection, heard and properly excluded.

CUB did not respond to the Company’s objections to the previously struck statements contained in its witness Mierzwa’s proposed direct testimony, including testimony previously struck as “*per se*” inappropriate. *See* attached Ex. A, Apr. 8, 2004 Tr. at 578:13-579:16 Absent

any response from CUB, the ALJs should grant Nicor Gas' objections to the previously struck statements contained in Mierzwa's proposed testimony as set forth in the Motion.<sup>6</sup>

Staff offers two arguments in defense of the use of previously struck statements in its witnesses' testimony:

**One:** Staff argues that the ALJs' prior rulings are not binding on Staff, because Nicor Gas withdrew its earlier pre-filed testimony. Staff asserts: "If Nicor wishes to limit other parties to evidence already submitted and rulings already made in this docket, then Nicor should be held to the same limitation." Resp. at 9. Unlike Staff, however, Nicor Gas' did not include in its subsequent direct case filed in April 2007 any of the statements struck from the Company's prior testimony by the ALJs in 2004. The same limitation must apply to *Staff*.

**Two:** Staff asserts that it has "rewritten its testimony and offers new bases for its admissibility" (Staff Resp. at 9), although in reality Staff's testimony is virtually a word-for-word copy of what Staff proposed to introduce into evidence in 2004. Further, Staff does not identify anything in Nicor Gas' re-filed case that somehow would "open the door" for reconsideration of the ALJs' prior rulings, or somehow make admissible anything previously found to be inadmissible. On the contrary, Staff mostly repeats the very same arguments that the ALJs previously considered and rejected related to the same patently improper proposed testimony.

In a few instances, Staff points to purely cosmetic changes in its witnesses' proposed testimony which have no bearing on the merits of the ALJs' prior rulings. For example, Staff witness Maple continues to support a multi-million-dollar proposed adjustment based upon his

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<sup>6</sup> See attached updated Ex. F at Objection Nos. 1, 6, 7, 15, 29, and 32.

speculation about the meaning of a hand-written word (“[REDACTED]”) as it appears in the margin of a discovery document. *See* Mot. at Ex. C, Objection Nos. 24, 26-27. Staff asks the ALJs to reverse their prior ruling and allow this improper testimony because Maple now has added an on-line dictionary definition of the word. But the “definition” Maple provides does not address the grounds for Nicor Gas’ objection *or* the ALJs’ prior ruling to exclude the *same* proposed testimony—*i.e.*, that Maple’s proposed testimony is based entirely upon speculation about the supposed meaning of some handwritten notes in the margin of a document.<sup>7</sup> Maple does not even know who made those notes, or when, or under what circumstances, much less what that person was thinking at the time. The ALJs should enforce their prior evidentiary rulings.

### C. Discovery Depositions<sup>8</sup>

In summer 2003, Staff and CUB deposed 13 current and former Company employees. The witnesses appeared and the parties went forward with the agreement that these would be *discovery* depositions. Accordingly, Nicor Gas gave Staff and CUB free rein in the scope and manner of questioning with the reasonable and good faith understanding that the depositions would be used as a discovery tool, not to preserve evidence for hearing.<sup>9</sup> Nonetheless, Staff witnesses Zuraski and Maple and CUB witness Mierzwa offer more than 30 pages of quotations

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<sup>7</sup> *See* attached Ex. A, Apr. 8, 2004 Tr. at 633:13-16 (“striking the witness’s *speculation* as to what the words handwritten on the side of the paper mean”) (emphasis provided).

<sup>8</sup> The ALJs reserved ruling on Nicor Gas’ earlier request to strike Staff’s and CUB’s witnesses’ quotations from the discovery depositions on the basis that “the deposition testimony at issue may be admissible through other means, *e.g.*, via an adverse witness.” Notice of ALJs’ Ruling (Apr. 2, 2004). The ALJs should not defer ruling on the instant Motion on these grounds. The parties have agreed that a preliminary ruling regarding the admissibility of discovery deposition testimony will serve the interest of administrative efficiency and the “present[ation] [of] a clean record upon evidentiary hearing.” *See* Mot. for Entry of Case Management Order (Aug. 13, 2009).

<sup>9</sup> *See In re Estate of John D. Rennick*, 181 Ill. 2d 395, 401, 692 N.E.2d 1150, 1154 (1998) (“The purpose of a discovery deposition is to explore the facts of the case, and for this reason wide latitude is given in the scope and manner of questioning. In contrast, an evidentiary deposition is generally used for the purpose of preserving testimony for trial, and questioning is therefore limited by the rules of evidence.”) (citations omitted).

from those discovery depositions to establish “facts” relating to the operation of the former GCPP. Indeed, they go so far as to ask the Commission to accept their own personal “inferences” drawn from the discovery depositions as substantive factual evidence, since the testimony, itself, is often muddled. That is no surprise, given the manner in which the depositions were conducted, and this is exactly *why* Illinois strictly limits the use of discovery depositions at trial.

This misuse of the discovery depositions violates Illinois Supreme Court Rule 212, which governs the use of discovery depositions in evidence. Absent a contrary administrative rule, Rule 212 applies in Commission proceedings, as CUB at least acknowledges in its Response. 83 Ill. Admin. Code § 200.610(b); *see* CUB Resp. at 9. In addition, the Motion demonstrates that Staff’s and CUB’s proposed use of the discovery depositions is inconsistent with Commission practice and procedure, which as a matter of policy discourages the use of depositions *in the first place*. *See* 83 Ill. Admin. Code § 200.340. Finally, Staff’s and CUB’s misuse of the discovery depositions conflicts with Illinois case law limiting the introduction of hearsay—including specifically discovery deposition testimony—through opinion witnesses. *See Rios v. City of Chicago*, 331 Ill. App. 3d 763, 770-72, 771 N.E.2d 1030, 1036-38 (1st Dist. 2002) (reversing for misuse of discovery deposition testimony admitted through an expert).<sup>10</sup>

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<sup>10</sup> As discussed in the Motion, Federal Rule of Evidence 703 was essentially adopted in Illinois by *Wilson v. Clark*, 84 Ill. 2d 186, 193-96, 417 N.E.2d 1322, 1326-27 (1981). Rule 703 provides that an expert may base an opinion upon “facts or data” that need not be admissible in evidence. Fed. R. Evid. 703. However, Rule 703 requires a threshold showing that the facts or data are “of a type reasonably relied upon by experts in the particular field in forming opinions.” *Id.* Moreover, that the facts or data were relied upon by the expert does not necessarily make them admissible in evidence. Instead, such facts or data may be disclosed to the fact-finder only if “their probative value ... substantially outweighs their prejudicial effect.” *Id.* Here, the “facts or data” (if they can be characterized as that) inferred by Staff’s and CUB’s witnesses based upon the depositions have *no* probative value at all.



**1. The Discovery Depositions Are Not Admissible Under Supreme Court Rule 212 As Admissions**

Staff and CUB argue that their opinion witnesses may introduce the discovery depositions as “admissions” pursuant to Supreme Court Rule 212(a)(2). But none of the discovery deposition excerpts included in their proposed testimony actually qualifies as an admission under Illinois law. Under Staff’s own cases, an out-of-court statement is an admission only if it “tend[s] to establish a material element or issue in the litigation.” *Cardiel v. Warren*, 191 Ill. App. 3d 816, 821, 548 N.E.2d 1081, 1084 (1st Dist. 1989) (statement tending to show that in Dram Shop Act case defendant served alcoholic beverages to co-defendant); *Vojas v. K-Mart Corp.*, 312 Ill. App. 3d 544, 548, 727 N.E.2d 397, 401 (5th Dist. 2000) (premises liability suit, statement of employees tending to show that defendant had notice of unsafe condition); *First Assist, Inc. v. Indus. Comm’n*, 371 Ill. App. 3d 488, 867 N.E.2d 1063 (4th Dist. 2007) (in workers’ compensation case involving wage differential claim, statement by representative of employer that operating room nurses were paid \$43 per hour). CUB explicitly recognizes that admissions must tend to establish a material issue in the case. CUB Resp. at 6-7.

Staff makes no real effort to establish that any of the deposition testimony quoted by its witnesses actually constitutes an admission. *See* Staff Resp. at 1-12 and Exs. B-C. Instead, Staff simply relies on the fact that most of the deponents were Company employees at the time of their examinations.<sup>11</sup> Staff Resp. at 11. That is not the law, however. Under that simplistic analysis, any words uttered by any corporate employee during a discovery deposition would be admissible in evidence, thereby eviscerating the well-established distinction in Illinois state practice between discovery and evidence depositions.

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<sup>11</sup> This is a separate and necessary requirement for a statement to be considered an admission, but is not by itself sufficient. *Vojas*, 312 Ill. App. 3d at 548, 727 N.E.2d at 401 (2000).

Although CUB concedes that whether a statement constitutes an admission must be assessed “on a case-by-case” basis (CUB Resp. at 5-8), CUB does not articulate in its Response why *any* specific discovery deposition testimony selectively quoted by Mierzwa actually would qualify as an admission. Further, CUB does not make any effort to identify how any of the deposition testimony Mierzwa quotes tends to prove any issue in this proceeding, let alone a material issue. Instead, CUB attempts to justify its use of the deposition testimony with the generic assertion that the statements in the deposition testimony quoted by its witness Mierzwa “challenge the Commission’s assumption in granting the program that it was likely to result in lower rates” and “reveal that certain Company employees felt the program was designed to maximize the Company’s profit under the GCPP at its customers’ expense.” (CUB Resp. at 7). Aside from the irrelevance of these issues under the Second Interim Order, CUB identifies no deposition testimony cited by Mierzwa that remotely supports this assertion.<sup>12</sup>

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<sup>12</sup> Another example of CUB’s “liberal” characterizations of deposition testimony can be found in Mierzwa’s quotation from the [REDACTED] discovery deposition in support of his opinion that Nicor Gas had a [REDACTED]

[REDACTED] Mierzwa Dir., CUB Ex. 1.0 at 29:807-09. The quote is as follows:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*Id.* at 31:873-32:890 (emphasis provided). Even assuming that the existence of a supposed [REDACTED] retains any relevance in this proceeding (given that the Company’s undisputed restated financial results already return any savings realized from LIFO liquidation), [REDACTED] personal opinion about what unidentified other persons “felt” or what influenced the decisions of these unnamed persons cannot be deemed an admission of anything by the Company.

## 2. Commission Practice And Procedure Does Not Support The Selective And Out-Of-Context Introduction Of Discovery Deposition Testimony

Staff and CUB argue that Nicor Gas' objection to misuse of the discovery depositions in their proposed testimony is merely "formalistic" (Staff Resp. at 12) or "form over substance" (CUB Resp. at 9). This is a convenient argument by parties who cannot identify any precedent for the manner in which their witnesses misuse the discovery depositions in this proceeding. Staff and CUB cannot point to any proceeding in which the Commission ever has admitted discovery deposition testimony. Nor can they point to any Illinois civil action in which a party has taken the kind of extraordinary liberties found in Staff's and CUB's proposed testimony. There is none.

Staff also argues that Nicor Gas "is not prejudiced" by its misuse of the discovery depositions. Staff Resp. at 14. This argument is also wrong. Nicor Gas was entitled to rely on Staff's representations that the depositions, if allowed, would be conducted and treated as discovery depositions, and not only Nicor Gas but the Commission's fact-finding process would be prejudiced if Staff's and CUB's suggested procedures are tolerated.

For example, to support his "opinion" that the Company's "own [unidentified] employees believed in the accuracy of the bucket reports,"<sup>13</sup> Maple offers the totally out-of-context quotation below from the discovery deposition of former Nicor Gas employee [REDACTED]. Maple Dir., Staff Ex. 2.0, 45:763-79. Nicor Gas asks the ALJs, in particular, to take note of the italicized language—directly before and directly after the excerpt chosen by Maple—which

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<sup>13</sup> By way of background, the so-called "bucket reports" were documents created from time-to-time during the operation of the GCPP to help Nicor Gas management better understand various aspects of the new and obviously novel program's operation.

Maple selectively excluded from his testimony for the obvious reason that it did not support his own “opinion” about Nicor Gas’ supposed “beliefs”:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Dep. Tr., 142-44 (emphasis provided).

This selective and out-of-context presentation of discovery deposition testimony, which is endemic in Staff's and CUB's proposed testimony, may serve these parties' adversarial goals, but it also wholly and patently distorts the record of evidence on which the Commission must rule. It should not be allowed.

#### **D. State-of-Mind And Otherwise Inadmissible Testimony**

Nicor Gas moved to strike Staff's and CUB's speculation as to its employees' and even its supposed "corporate" state-of-mind. The Company also asked the ALJs to strike other facially improper testimony by Maple and Mierzwa including, most notably, Maple's reckless assertion that the Company was "able to steal tens of millions of dollars from ratepayers"<sup>14</sup> (Maple Dir., Staff Ex. 2.0, 41:699) and Mierzwa's inappropriate and wholly in-expert commentary on the veracity of other witnesses' testimony (Mierzwa Dir., CUB Ex. 1.0, 29:787-91, 32:910-33:923). The Company specifically identified and demonstrated the inadmissibility of each piece of Staff's and CUB's proposed testimony challenged on these grounds. To the

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<sup>14</sup> As noted in the Motion, Nicor Gas on average actually had the lowest gas supply costs among Illinois' six largest natural gas utilities while the GCPP was in effect. Mot. at 4 (citing Bartlett Dir., Nicor Gas Ex. 1.0, 4:66-69). The Company also reversed all the transactions that were not properly accounted for in the first instance under the GCPP, based upon the recommendations of former U.S. Attorney Scott R. Lassar, with the assistance of accounting firm KPMG LLP. See discussion below at II. F. Staff's Additional Arguments.

limited extent Staff or CUB have responded, Nicor Gas further supports its objections in the updated objections tables attached to this Reply.

While Nicor Gas will not belabor specific items here, a short discussion of Staff's and CUB's general "justifications" for their state-of-mind testimony is worthwhile. Except in rare instances not present here, the state-of-mind of another person is not susceptible of first-hand knowledge, which is a hornbook prerequisite for testimony. Staff's and CUB's witnesses by all accounts are not mind readers and have no special expertise in the subject of psychology. Staff's witnesses Zuraski and Maple and CUB witness Mierzwa have no actual knowledge of the mental state of any Company employee, much less that of the "Company" as a corporate entity. As the ALJs have already correctly found: Staff's and CUB's witnesses simply "*cannot* know the Company's state of mind." Apr. 8, 2004 Tr. at 634:19-21 (emphasis provided). The ALJs made that finding six years ago. It was correct then, and it is correct now. Staff and CUB have offered nothing whatsoever to demonstrate otherwise.

Staff's and CUB's witnesses in almost every instance propose to testify as if the state-of-mind attributed to Nicor Gas and/or its employees was a matter of *fact* for the Commission to consider in its determinations. For example, Staff witness Maple testifies that "Nicor *purposely* withheld relevant documents from Staff in response to data requests, changed the format of reports to Staff to hide the LIFO benefit, *and created a pervasive feeling throughout the corporation that no employee was to 'highlight' any such information to Staff.*" Maple Dir., Staff Ex. 2.0, 17:299-18:302 (emphasis provided) (*see* Mot., Ex. C at Objection Nos. 10-11). Maple, however, cannot truthfully report any of these supposed "facts." But even if Maple only were offering his "opinion" on the matter, the proposed testimony would be equally improper. Maple is not qualified to opine as to the state-of-mind of another person or entity. *See Matter of*

*Wellington*, 34 Ill. App. 3d 515, 518-19, 340 N.E.2d 31, 34-35 (1st Dist. 1975) (non-certified psychologist’s expert testimony as to respondent’s state-of-mind was error). And the speculation about Nicor Gas’ and its employees’ intent or purpose peppered throughout his proposed testimony has no bearing on any issue in this proceeding or probative value of any kind.

*Poulakis v. Taylor Rental Center, Inc.*, 209 Ill. App. 3d 378, 383, 568 N.E.2d 196, 1999 (1st Dist. 1991) (“Opinion testimony that is based purely on guess, surmise or conjecture is inadmissible and is tantamount to no evidence at all.”)<sup>15</sup>

In response to the Motion’s well-established legal authority for its state-of-mind objections, Staff and CUB offer only spurious rationalizations. The gist of Staff’s argument is that its witnesses Zuraski and Maple, while not clairvoyant, nonetheless are able to *discern* the state-of-mind of Nicor Gas and/or its employees through reading discovery materials and, in effect, putting themselves in someone else’s shoes.

Maple opines that former Nicor Gas employee [REDACTED]

[REDACTED]. Maple Dir., Staff Ex. 2.0 at 52:913-17 (*see* attached Ex. C at Objection No. 45). Maple bases his conclusion on a [REDACTED] (*see* Maple Dir., Staff Ex. 2.0 at Attachment M) and an excerpt from [REDACTED] discovery deposition (*Id.* at 53:919-21). But the accounting memo in no way reflects what [REDACTED] thought “would be

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<sup>15</sup> Where a third party has been allowed to testify about the *emotion* of another person, it has been where the testifying witness has had an opportunity to observe first-hand the objective behavior exhibited by the person whose emotion is being described. This was the situation in the one case repeatedly relied upon by Staff, *Law v. Cent. Ill. Pub. Serv. Co.*, 86 Ill. App. 3d 701, 408 N.E.2d 74 (4th Dist. 1980), where a witness who observed the deceased was permitted to testify that the deceased was in fear just before he was electrocuted and died. *See* Staff Resp. at 27, 28, 29 and Staff Resp. Ex. C at 8, 9, 13.

apparent to Staff.” Maple’s “conclusion” is nothing more than a wholly subjective inference. As for the deposition testimony, it too fails to provide an evidentiary basis for Maple’s personal conclusions about what █████ “realized” or “knew” at the time. █████ was not even responding to any question about what he “knew” or “realized.” For Maple to support his conclusion about █████ mental state (assuming that it were relevant, and it is not), Staff should have asked that question directly at █████ deposition. It failed to do so, and Staff cannot now be allowed to substitute unsupportable second-hand inferences for testimony from the actual witness whose knowledge is being put at issue.

CUB argues that even if Mierzwa’s proposed state-of-mind testimony cannot be admitted under the Rules of Evidence, the ALJs nonetheless should allow the testimony under Section 200.610(b) of the Rules of Practice, because “it is of a type commonly relied upon by reasonable prudent persons in the conduct of their affairs.” CUB Resp. at 12 (citing 83 Ill. Admin. Code § 200.610(b)).<sup>16</sup> CUB argues that, because its witness Mierzwa “has been [sic] expert specializing in gas purchasing practices and policies and other utility issues for almost 20 years,” then his “opinion testimony regarding the Company’s state-of-mind are [sic] within the scope of his knowledge and experience and are relevant to the issues in this proceeding.” CUB Resp. at 3-4. This argument confuses Mierzwa’s claimed expert qualifications regarding gas purchasing for competence to offer state-of-mind testimony. Mierzwa is not an expert in psychology or any related field, and is not even being offered as such. Accordingly, his opinion regarding the “state of mind” of Nicor Gas or any of its employees is inadmissible.

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<sup>16</sup> In its Response, Staff also seeks to rely upon Section 10-40 of the Illinois Administrative Procedure Act (the “APA”), 5 ILCS 100/10-40, in addition to Section 200.610(b) of the Rules. Staff Resp. at 32-34. But Section 200.610(b) of the Rules is derived from Section 10-40 of the APA. Staff’s supposed “additional” authority, thus, provides no support for its efforts to introduce patently inadmissible and unreliable evidence in this proceeding.



## E. Exhibits

Since filing the Motion, Nicor Gas has worked with Staff and CUB and compromised its objections to many of the hearsay exhibits attached to Staff witness Maple's and CUB witness Mierzwa's testimony.<sup>17</sup> For the ALJs' convenience, the updated objections tables attached to this Reply indicate specifically where Nicor Gas has withdrawn its objection to a document based upon the First Stipulation. The documents included in the First Stipulation also have been removed from the copies of Maple's and Mierzwa's testimony attached to the updated objections tables, since they are no longer in dispute. No ruling on these items is requested.

The documents listed below remain disputed and subject to rulings on the Motion.

- Maple Attachment E
- Maple Attachment F and Mierzwa Ex. 1.21
- Maple Attachments G and H
- Maple Attachment M and Mierzwa Ex. 1.05
- Mierzwa Ex. 1.06
- Mierzwa Ex. 1.08
- Mierzwa Ex. 1.11
- Mierzwa Ex. 1.15
- Mierzwa Ex. 1.16
- Mierzwa Ex. 1.17

As to these documents, the parties have entered into a Second Stipulation, which has been filed at the same time as this Reply. Second Stipulation (Apr. 2, 2010). Nicor Gas objects to the admission of any of the documents contained in the Second Stipulation into the record in this proceeding. Second Stipulation at ¶ 3. The Second Stipulation merely confirms (at Staff's requests) that the challenged documents were produced in discovery in this proceeding and are in a form substantially identical to that in which Nicor Gas produced them. The fact that these

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<sup>17</sup> See First Stipulation filed simultaneously with this Reply.

documents were produced in discovery, of course, does not *ipso facto* make them admissible in evidence.<sup>18</sup> In the interest of brevity, Nicor Gas makes its specific reply arguments as to these documents in the attached updated objections tables.<sup>19</sup>

#### **F. Staff's Additional Arguments**

Staff makes three isolated arguments against the Motion near the end of its Response. *See* Staff Resp. at 31-32. While these arguments are unconnected to any particular Company objection, nonetheless, they merit a short reply. *See* Staff Resp. at 31-32.

**First**, Staff argues that the size of the refunds sought by Staff and CUB in this proceeding—which amount in total to approximately five years of the Company's net income—should have no bearing on the ALJs' rulings. Nicor Gas agrees that each ruling should be made consistent with the Commission's Rules of Practice and applicable evidentiary law. However, Staff's and CUB's request that the Commission bend evidentiary standards to permit otherwise improper testimony requires that the ALJs and the Commission consider the extraordinary size of these parties' proposed adjustments. If Staff and CUB wish to prove their extraordinary claims, which are beyond the Company's direct case and on which they bear the burden of proof, they should be required to do so through competent evidence.

**Second**, Staff complains about Nicor Gas' description of Staff's and CUB's direct cases as “ask[ing] the Commission to pursue, in effect, a complete hindsight reconstruction of what the

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<sup>18</sup> Staff's argument that any document produced in a Commission proceeding somehow automatically is admissible in evidence is just wrong. Staff asserts that its witness Maple's attachments all should be admitted—with or without any foundation or relevance to the issues in this proceeding—because they “bear the evidentiary watermark of Nicor's Bates stamp.” Staff Resp. at 22. But a Bates stamp is nothing more than a means of organizing *discovery* documents. It has nothing to do with whether a document properly can be admitted into *evidence*.

<sup>19</sup> For ease of reference, the documents contained in the Second Stipulation are included with the copies of Maple's and Mierzwa's testimony attached to this Reply.

Company's gas costs might have been during the 1999-2002 time period, if only things had been different at the time." Staff Resp. at 31-32 (quoting Mot. at 2). If Staff is not seeking such a "reconstruction" then Nicor Gas is pleased to hear that and withdraws its objection on that ground. However, as stated earlier, such a reconstruction is not permitted by either the Second Interim Order or the Act, and certainly not "based solely on [Staff witnesses'] review of documents and other discovery, and through assumptions and pure speculation." Mot. at 2.

Staff implies that Nicor Gas' case is no different from its own, but Staff is dead wrong. Nicor Gas' case is based on its audited restated financial statements for 1999-2001 and the related reconciliation statements filed with the Commission in 2003.<sup>20</sup> The Company's restated financials, in turn, are based upon adjustments to the GCPP's results recommended by former U.S. Attorney Scott R. Lassar to a Special Committee of independent, non-management directors of Nicor Inc. These adjustments reverse the results of various transactions that Lassar (with the assistance of accounting firm KPMG LLP) determined were not properly accounted for in the first instance. In sharp contrast, Staff's and CUB's proposals are based almost entirely upon the application of selective after-the-fact modifications to the Commission's Order in Docket 99-0127. Moreover, the Company never has sought to introduce the so-called Lassar Report in evidence. While Lassar's recommendations and conclusions address the same subject matter as this proceeding, the remainder of the report is not and never was intended to be evidentiary.

***Third***, Staff asserts for the first time in its Response to the Motion—*years after this proceeding was reopened*—that it is now disputing the results of Nicor Gas' financial restatement. See Staff Resp. at 32 ("Staff is vigorously and appropriately contesting the

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<sup>20</sup> Gorenz Dir., Nicor Gas Exs. 2.1, 2.2, 2.3, 2.4, and 2.5.

substance and thoroughness of that restatement”). On the one hand, this assertion is irrelevant to the instant Motion. Whether Staff disputes any portion of the Nicor Gas’ financial restatement has nothing to do with whether Staff can introduce voluminous incompetent testimony in this proceeding. On the other hand, Staff’s assertion is simply false. In his proposed testimony, Staff’s lead witness Zuraski unequivocally states that “*Staff is not disputing this restatement.*” Zuraski Dir., Staff Ex. 1.0 at 9:191 (emphasis provided).<sup>21</sup> That fact, at least, has not changed.

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<sup>21</sup> Staff witness Zuraski made the exact same statement in his testimony filed in 2003. Zuraski Dir., Staff Ex. 1.0 at 12:264 (Nov. 21, 2003).

**III.**  
**CONCLUSION**

WHEREFORE, for these reasons, Nicor Gas respectfully requests that the Administrative Law Judges (1) strike those portions of the direct testimony by Staff of the Commission and the Citizens Utility Board that are subject to objection on this Motion to Strike; (2) require Staff and CUB to amend and re-file their direct testimony to reflect the ALJs' rulings; and (3) grant such other relief as is just and appropriate.

Dated: April 2, 2010

Respectfully submitted,

NORTHERN ILLINOIS GAS COMPANY  
D/B/A NICOR GAS COMPANY

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**CERTIFICATE OF SERVICE**

I, John E. Rooney, hereby certify that I caused a copy of the Reply in Support of Motion to Strike Direct Testimony of Nicor Gas Company upon the service list in consol. Docket Nos. 01-0705, 02-0067 and 02-0725 by email on April 2, 2010.

/s/ John E. Rooney  
John E. Rooney